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No. 525

Supreme Court of the United States

OCTOBER TERM, 1953

NONLES PARNACHER, DEVET PARNACHER,
NANNIE PARNACHER, now JOHNSON,
and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Come now the petitioners, Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, and pray the Court for a rehearing on their petition for writ of certiorari in this case, and respectfully petition the Court to vacate and set aside the order made herein on the 8th day of March, 1954, denying their petition for certiorari, and to grant a rehearing thereon, and as grounds for this petition for rehearing allege that substantial grounds for the granting of certiorari, available to petitioners when said order was made, but not previously presented to this Court, exist in this case, as follows:

(1) There was no clear cut plea of *res adjudicata* or estoppel by judgment in the answer of respondent in the United States District Court, and respondent did not contend in the United States District Court in this case or in the Court of Appeals that the decision of the Supreme Court of Oklahoma, in the case of *Nonles Parnacher et al.* v. *Houston B. Mount*, 207 Okla. 275, 248 P.2d 1021, was conclusive by way of estoppel or *res adjudicata* as to the issues in this case.

(2) Under the law of Oklahoma, a judgment is not conclusive by way of estoppel as to a matter which was not within the issues presented by the pleadings, and the matter purportedly decided by the Supreme Court of Oklahoma in the first paragraph of its syllabus in the case of *Nonles Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, was not within the issues framed by the pleadings in that proceeding.

(3) In the brief of respondent in opposition to the petition for writ of certiorari, filed in this Court, it was incorrectly asserted that it had not been claimed by petitioners in the Court of Appeals that under Section 3(b) of the Act of Congress of August 4, 1947 (61 Stat. 732), only the final judgment in a probate proceeding (the decree of distribution) could be conclusive on the United States and restricted Indian heirs, as to restricted property, as a determination that a will was an effective alienation of restricted Indian land, whereas the actual facts are that said proposition had been asserted in the Court of Appeals, and that Court failed to rule on the point, except insofar as it may have erroneously concluded that the order ad-

mitting the will to probate was a final judgment, and that the question as to whether the will could operate on restricted property was necessarily decided in determining whether the will should be admitted to probate, or the defendant appointed executor without bond as directed in the will.

ARGUMENT

First Proposition

(First Ground Above Stated)

In the District Court in this case the respondent did not actually contend that the decision of the Supreme Court of Oklahoma in the probate proceeding (*Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), was conclusive as to the issues in this case as an estoppel by judgment or under the doctrine of *res judicata*. In paragraph numbered 13 of plaintiffs' complaint, filed in this case April 17, 1952 (R. 7), it was, in part, alleged:

> "Plaintiffs allege that there has not been any final judgment in probate proceedings upon the estate of said allottee of said land which has precluded the plaintiffs from asserting that said will is void as to restricted property and allege that on the 11th day of March, 1949, the County Court of Pontotoc County, Oklahoma, in probate case numbered 4663 wherein the defendant herein had filed a petition for probate of said alleged will, rendered a judgment denying such petition and adjudging that said purported will was not entitled to be admitted to probate, and denying probate thereof, and that thereafter on an appeal, taken by the defendant herein from said order and judgment of the County Court of Pontotoc County,

Oklahoma, to the District Court of Pontotoc County, Oklahoma, in case numbered 19533 in the District Court of Pontotoc County, Oklahoma, said District Court of Pontotoc County, Oklahoma, on the 29th day of August, 1949, entered and rendered judgment that said order of the County Court be reversed, and that said purported will be admitted to probate, and plaintiffs further allege that from such judgment of the District Court of Pontotoc County, Oklahoma, they made an appeal to the Supreme Court of the State of Oklahoma which is now pending in case numbered 34531 in the Supreme Court of the State of Oklahoma on the question as to whether said purported will should be admitted to probate, and that said judgment of the District Court of Pontotoc County, Oklahoma, that it be admitted to probate is not final and was superseded during said appeal, * * *."

There was no affirmative plea of *res adjudicata* or estoppel by judgment in the answer of defendant in this case (R. 21). In paragraph numbered 12 of the answer it was said:

"As to paragraph numbered 13 of plaintiffs' complaint, defendant denies that there has been no final judgment in such proceedings which precludes the plaintiffs from asserting that said will is void, and alleges the facts to be that the proceedings to probate said will and appoint an executor filed in the County Court of Pontotoc County, Oklahoma, was appealed to the District Court of Pontotoc County, Oklahoma, and said district court ordered said will admitted to probate, an appeal was taken from the order of said District Court to the Supreme Court of Oklahoma, and the Supreme Court on the 25th day of March, 1952, affirmed the judgment of the District Court admitting said will to probate, and ordering the appointment of

defendant herein as executor; that petition for rehearing was filed in said Supreme Court by plaintiffs herein and said petition for rehearing was denied on September 30, 1952, and thereafter the Supreme Court refused to allow the filing of a second petition for rehearing, and on the 23rd day of October, 1952, issued mandate therein to the District Court of Pontotoc County, Oklahoma; that pursuant to the insistence of plaintiffs herein, through their counsel in the County Court and the District Court, and in their brief filed in the Supreme Court that the court in the proceedings now pending should determine whether or not said will had been approved in accordance with the Act of Congress of April 26, 1906, as amended by the Act of May 27, 1908, the said Supreme Court did in its opinion state, 'the will before us appears to have been properly executed, attested, and acknowledged before, and approved by, a County Judge of Oklahoma,' and said decision of the Supreme Court of Oklahoma has now become final" (R. 25).

Defendant's counsel did not assert that the requisites for a plea of estoppel by judgment of a decision on the merits within the triable issues actually litigated between the parties, which could be conclusive as to the issues in this case, had been rendered by the expression of opinion on the point in question by the Supreme Court of Oklahoma, and never actually contended that, and this was later admitted by them in the Court of Appeals. The petitioners could not be estopped by the decision of the Supreme Court of Oklahoma under the doctrine of estoppel by election of remedies, as that doctrine cannot apply in a case wherein there was no remedy in the particular proceeding before the Court as to the particular matter pur-

portedly decided, and, as shown by the quotation with approval by the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra,* from the opinion in *Armstrong* v. *Letty,* 85 Okla. 205, 209 Pac. 168, there was no remedy in that particular proceeding for petitioners' contention that the will was void as to restricted property under the Act of Congress. 28 C.J.S., Election of Remedies, Sec. 11, p. 1080; *Midland Savings & Loan Co.* v. *Tradesmen's Nat'l Bank* (10th Cir.), 57 F.2d 686, 693; *Tulsa Rig, Reel & Mfg. Co.* v. *Arnold,* 94 Okla. 120, 221 Pac. 19; *Ahrens* v. *Commercial Nat'l Bank,* 100 Okla. 250, 229 Pac. 287.

The defendant's counsel did contend in this case in the United States District Court that the Federal Court had no jurisdiction in this case because of Section 3(a) of the Act of Congress of August 4, 1947 (61 Stat. 732) (R. 15, 21), but that was obviously incorrect, as this suit was not a proceeding to probate or contest a will, or an administration proceeding, and this point was ruled against defendant (R. 20, 29, 67). *Ferguson* v. *Patterson* (10th Cir.), 191 F.2d 584.

When this case was orally argued in the Court of Appeals on September 9, 1953 (R. 93), the question as to whether anything said in the opinion of the Supreme Court of Oklahoma on the appeal from the order admitting the will to probate could be conclusive of the issues in this case under the doctrine of estoppel by judgment or *res adjudicata* had not been briefed, and respondent had not contended that it could have that effect, and the Court then directed that supplemental briefs be filed on the question (R. 93), and, in respondent's answer brief to supplemental brief of appellants in the Court of Appeals on this question,

it was admitted that respondent was making no contention that it could have that effect, and had not done so in the District Court, and in such brief, respondent's counsel in the Court of Appeals said:

> "We say that appellants have set up a straw man to tear down for the reason that we have never at any time, in our briefs or in argument to this court, or to the United States District Court, claimed that the opinion of the Supreme Court of Oklahoma, reported in 248 P.2d 1021, was *res adjudicata* as to any issue in this court * * *.
>
> "We cited in our brief the case of *Parnacher* v. *Mount*, 248 P.2d 1021, not because we thought it constituted a *res adjudicata* in this court, and not because we thought it worked an estoppel by judgment in this court, but because we believe that the reasoning of the Supreme Court of Oklahoma is sound, and constitutes a correct statement of the law to be applied to this case."

We realize these matters (as to the contents of the briefs filed in the Court of Appeals) are not now shown by the record in this Court, but believe that same probably could be made a part of the record in this Court, and ought to be considered by the Court, on this question, as the decision of the Court of Appeals, of which certiorari is sought for review, was based upon a point not even urged by respondent's counsel, and which they confessed was not applicable in this case.

Second Proposition

(Second Ground Above Stated)

Petitioners never pleaded in their contest against the probate of the will, filed in the Probate Court (R. 77), that the will was void as to restricted property, or had not been properly approved by an officer having jurisdiction to approve it, or that the will should be denied probate because not properly approved in accordance with the Act of Congress (Section 23 of Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of Act of May 27, 1908, 35 Stat. 312, 315). The fact that the County Judge of Pontotoc County had refused to approve it when it was submitted to him for approval, and that respondent later secured the purported approval of the same will by the County Judge of Garvin County was mentioned in the contest (R. 78), not as a ground for contest of the probate of the will, but in attempting to plead facts showing that the will (not the approval) had been obtained by undue influence, a statutory ground of contest of probate of a will, under Section 41 of Title 58, Okla. Stat. Anno., as the fact that a will of a full-blood Indian is purportedly approved by an officer of the class designated in the Act of Congress may possibly be taken as some indication that there was no undue influence exercised in the obtaining of the will. It is settled law in Oklahoma that the fact that a will of a full-blood Indian is not approved or properly approved in accordance with said Act of Congress is not a ground for contest of the probate of the will, under the statutes of Oklahoma. *Phillips* v. *Smith*, 186 Okla. 636, 100 P.2d 249; *Armstrong* v. *Letty*,

85 Okla. 205, 209 Pac. 168; *Lauderdale* v. *Tookolo*, 114 Okla. 187, 243 Pac. 587. See article by A. W. Trice in Volume 16 at page 602 of the Oklahoma Bar Journal, published April 28, 1945, entitled: *Memorandum on Caesar* v. *Burgess*, discussing the case of *Caesar* v. *Burgess*, 103 F.2d 503, which article explains this clearly. Therefore, the issues in this case were not within the pleadings, or issues which could have been properly included in the pleadings, or litigated, in the proceeding for probate of the will in the state courts. It is obvious that this suit is not on the same cause of action as was presented in that proceeding. Therefore, the doctrine of *res judicata* does not apply. *United States* v. *International Building Co.*, 345 U.S. 502, 97 L. Ed. 1182, 73 Sup. Ct. 807; *Crockett* v. *Root*, 194 Okla. 3, 146 P.2d 555, and cases cited therein. The doctrine of estoppel by judgment cannot operate under Oklahoma law unless the matter was within the issues as tendered by the pleadings, and which could properly have been pleaded, in the former suit. The Supreme Court of Oklahoma said in its opinion in *Parnacher* v. *Mount*, *supra*, by its quotation with approval to that effect from *Armstrong* v. *Letty*, *supra*, that the point in question was not triable in that proceeding, for lack of jurisdiction in the original trial court to determine it. In such opinion, the Supreme Court of Oklahoma recognized that the matter was not within the triable issues within the jurisdiction of the trial courts in that proceeding, and that its opinion on the point could not be conclusive, by the following language, at page 1023 of 248 P.2d:

> "The will before us appears to have been properly executed, attested, and acknowledged before, and ap-

proved by, a County Judge of Oklahoma. In *Armstrong* v. *Letty*, 85 Okla. 205, 209 P. 168, it was said in the first syllabus:

" 'The approval and acknowledgment of the will of a full-blood Indian, required by Act Cong. April 26, 1906, sec. 23, as amended by Act Cong. May 27, 1908, sec. 8, is not an element of the execution and attestation contemplated by the statute of Oklahoma and is not within the purview of the jurisdiction of the county court in admitting a will to probate.'

"And in the body of that opinion it was said:

" 'This court has repeatedly held that the sole question involved, when a will is offered to the county court for probate, is the *factum* of the will. That is, has the will been executed and attested in the manner and form required by the statutes, and was the testator competent to make a will at the time he made it, and was he free from the disabilities which operate under our statute to defeat the will?'."

It is not within the power of an appellate court to conclusively decide a question on an appeal which was not in issue, and could not have been tried in the trial court, because of lack of jurisdiction. Any purported decision of such a point can have no more force than *dictum*. *In re Assessment of First National Bank of Chickasha*, 83 Okla. 233, 220 Pac. 909, 57 A.L.R. 890.

(The foregoing statement under this second proposition includes matter previously presented to this Court, but is a preface to the ground stated under the second proposition, which has not been previously presented.)

The purported decision of the Supreme Court of Oklahoma of the point expressed in the first paragraph of the

syllabus by the Court is void, just the same as if the point had been so decided in either of the trial courts in that proceeding, as under such Supreme Court's own statement, as above quoted from its opinion, there was no jurisdiction in the trial court in that proceeding to determine the question, and such purported decision of the point has the effect stated in the first paragraph of the syllabus by the Court in *Whitehead* v. *Bunch*, 134 Okla. 63, 272 Pac. 878, as follows:

> "In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of the judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant, and, where the court exceeds its jurisdiction and renders a particular judgment which it is wholly unauthorized to render, under such circumstances, such judgment is absolutely void, and subject to collateral attack."

In the case of *Henson* v. *Oklahoma State Bank*, 165 Okla. 1, 23 P.2d 709, it was held:

> "A judgment which is entirely outside the issues in the case and upon a matter not submitted to the court for its determination is a nullity * * *."

The rule is that a matter is not properly submitted to a court for its determination if it is outside the issues raised by the pleadings. *Hinkle* v. *Jones*, 180 Okla. 17, 66 P.2d 1073; *Henson* v. *Oklahoma State Bank, supra; Roth* v. *Union Nat'l Bank*, 58 Okla. 604, 160 Pac. 505, following *Reynolds* v. *Stockton*, 140 U.S. 265, 35 L. Ed. 464.

The facts which did develop in the probate proceeding concerning the manner in which the purported approval of the will was obtained were competent evidence on the issue as to whether the will (not the approval) had been obtained by undue influence, as it was competent to inquire on that issue as to everything which had been done with the will, both before and after it was executed.

The Supreme Court of Oklahoma, by its own statement in its opinion in *Parnacher* v. *Mount, supra,* as to the issues properly triable in a will contest proceeding, had no jurisdiction to conclusively determine the point expressed in the first paragraph of the syllabus by the Court.

Even if it could be said jurisdiction existed, it was a matter, which by reason of the nature of the proceeding, under the law of Oklahoma, could not have been adjudicated therein.

There is an error in a quotation from 50 C.J.S., Judgments, Section 731, page 222, at page 45 of petitioners' brief in support of their petition for certiorari, and it should read as follows:

> "A judgment is not conclusive on matters which were beyond the jurisdiction of the court *or* which by reason of the nature of the case could not have been adjudicated."

The opinion of the Supreme Court of Oklahoma in *Parnacher* v. *Mount* was filed March 25, 1952. Subsequent thereto and on April 1, 1952, the Supreme Court of Oklahoma decided the case of *In re Lamar's Estate,* 206 Okla. 244, 242 P.2d 727, and in it cited and followed *Armstrong* v. *Letty, supra,* and held that the sole question involved when a will is offered for probate is the factum of the will, and that other issues are not then triable.

Third Proposition

(Third Ground Above Stated)

At page 16 of the brief in response to petition for certiorari, the following statement was made:

> "Petitioners, at pages 46 and 47 of their brief in support of the Petition for the Writ, advance a highly technical theory as to whether or not the United States is bound by the judgment in the State Supreme Court, which theory has not been heretofore advanced or presented in any of the courts, either state or federal, wherein the controversy between these parties has been considered. Even if the theory could properly be presented *for the first time* in this Court, we do not feel that it is relevant or material to the question now before the Court as to whether or not the Writ of Certiorari should be granted."

Since respondent's attorneys made this assertion, petitioners believe they should be permitted to answer it. On October 11, 1953, counsel for petitioners (appellants) in the Court of Appeals served upon counsel for appellee in the Court of Appeals (respondent here) a supplement to their reply to the answer brief to appellants' supplemental brief on the question of the effect of the decision of the Supreme Court of Oklahoma in the probate proceeding, and, it was, by leave of court, filed in the Court of Appeals on October 13, 1953. In such supplement, the ground, for a holding that the decision of the Supreme Court of Oklahoma in the probate proceeding as to whether there had been a valid approval of the will under the Acts of Congress is not conclusive in this case, which is argued at pages 46 and 47 of petitioners' brief in support of their petition for certiorari, was presented and argued to the

Court of Appeals more fully than in the brief in support of petition for certiorari filed in this Court, and the Court of Appeals made no reference to such contention in its opinion, It was pointed out in such brief in the Court of Appeals that in *Armstrong* v. *Letty, supra,* the Supreme Court of Oklahoma had said:

> "A probate court in this state, having jurisdiction of the administration of an estate may, upon application, after legal notice, distribute an estate to the legal heirs as provided by the law of descent and distribution or according to the terms of a will, and such decree is an adjudication of the distributive shares of the heirs unless reversed on appeal. However, such a decree of distribution of Indian lands in this state would be subject to such limitation as the judgment of any other state court attempting to adjudicate title to restricted Indian Lands."

And the other matters set forth at pages 46 and 47 of petitioners' brief herein were argued in the Court of Appeals.

It is inconceivable that Congress, by Section 3(b) of the Act of August 4, 1947, 61 Stat. 732, intended to take away from the United States and its restricted Indian wards the right to attack a will of a full-blood Indian as a conveyance of restricted Indian land, where the requirements of the federal law had not been met, by suit in ejectment or to quiet title to the restricted property, after admission to probate of the will, and before the final judgment in the probate proceeding (the decree of distribution), in view of the fact that on the date of such Act of Congress it was clearly the law of Oklahoma that only the

final judgment (the decree of distribution) in a probate proceeding could possibly have the effect of an adjudication that the will was effective as an alienation of restricted property *(Armstrong* v. *Letty, supra).* It is clear that such an effect was guarded against by the language in the statute differing from the language in Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), and providing that only the *final* judgment in a probate proceeding should bind the United States and the parties thereto to the same extent as though no Indian property or question were involved, even where the notice provided for therein is served.

That the purported decision of the point in the first paragraph of the syllabus by the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra,* is no more binding on the plaintiffs herein than it would be on the United States Government, if it was attempting herein to protect the rights of these plaintiffs, see *Neal* v. *Travelers Insurance Co.,* 188 Okla. 131, 106 P.2d 811, and the cases cited by Judge Kennamer in *Mashunkashey* v. *Clinton,* 11 F. Supp. 456, for his holding that the Indian plaintiffs in that case could maintain the action, although the United States as guardian for restricted Indians could also have maintained the action, to-wit: *United States* v. *Equitable Trust Co.,* 283 U.S. 738, 51 Sup. Ct. 639, 75 L. Ed. 1379; *Barnett* v. *Equitable Trust Co.,* 34 F.2d 916.

CONCLUSION

It is therefore respectfully submitted that a rehearing should be granted in this case and the petition for certiorari to review the decision of the Court of Appeals be granted.

Respectfully submitted,

JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioners.

Of Counsel:
TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

March, 1954.

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is filed pursuant to paragraph 2 of Rule 33 of the Rules of the Supreme Court of the United States, and is confined to substantial grounds available to petitioners heretofore, although not previously presented, and is presented in good faith and not for delay, and is restricted to the grounds above specified.

James W Bounds,
JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioners,

March, 1954.